No. 12938

United States
COURT OF APPEALS
for the Ninth Circuit

UNION SULPHUR AND OIL CORPORATION,
a Corporation,
Appellant,

vs.

W. J. JONES & SON, INC., a Corporation,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States for the District of Oregon.

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Upon Appeal from the District Court of the United States for the District of Oregon.

STATEMENT OF THE CASE

Marshall, a longshoreman, was injured aboard the appellant's steamship HERMAN FRASCH when a rung on a ladder he was descending into No. 3 hold gave way, causing him to fall approximately 15 feet into the hold (Ap. 5-6, 15-16).

At the time of the accident Marshall was an employee of appellee, an independent contracting stevedore company, which was engaged in discharging sulphur from the vessel, then lying alongside a dock at Vancouver, Washington, on the navigable waters of the Columbia River (Ap. 5-6, 15, 16).

Instead of relying on his rights under the applicable Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S. Code, Sec. 901, et seq., to compensation from the appellee, his employer, Marshall elected under Sec. 933 of the Act to bring a so-called third party suit against the appellant in the form of a libel in rem against the steamship HERMAN FRASCH for the injuries received by him. In his libel, Marshall alleged that the accident was caused by the unseaworthy condition of the vessel and the negligence of appellant in this regard (Ap. 6-8).

Appellant filed a petition to implead appellee under Admiralty Rule 56 for the purpose of "compelling it to contribute to or pay in whole any *damages*" which might be decreed against the appellant on behalf of Marshall (Ap. 4).

Although admitting that the rung of the ladder was unseaworthy at the time of the accident, appellant claimed that this condition was caused solely by the appellee and that the proximate cause of the accident was appellee's negligence combined with the contributory negligence of Marshall (Ap. 8-11).

At the outset of the trial appellant settled Marshall's claim against it for $6,110.00. Contrary to the statement

in appellant's brief (p. 2), appellee did not "consent" to this settlement. Rather appellee agreed that the amount paid was reasonable in view of Marshall's injuries, that insofar as it was concerned it had no objection to appellant and Marshall making any settlement they wanted to, and that a settlement could be made without prejudice to appellant's claims against appellee (Ap. 14).

After a trial on the issue of appellant's claim for recovery over against the appellee, the District Court entered a decree, in part, dismissing appellant's petition to implead appellee (Ap. 22). The court found that Marshall's injuries resulted from the "joint and concurring negligence" of both appellant and appellee—the former in that "the weld by which the steel rung was welded to the vertical uprights of the ladder was defective" and the latter in that it had negligently "used the ladder for obtaining leads to its drag lines" thereby placing heavy strains on it and causing it to vibrate excessively (Ap. 16-19).

Under these circumstances the Court ruled that appellant's claims "should be denied upon authority of Amer. Mut. Liability Ins. Co. v. Matthews, 182 F. (2) 332, 2 Circ., and in conformity with Johnson v. United States, 79 F. Supp. 448 (1948)" (Ap. 19). Thus, the court recognized that appellant's claims to recovery over against the appellee were barred by the Longshoremen's and Harbor Workers' Act, under which appellee's exclusive liability in the present case was to pay compensation to its injured employee Marshall, and that to

allow any recovery over would be to make appellee liable indirectly for that which he has no direct liability.

This appeal, therefore, presents the question of whether a shipowner can recover over against the employer of a longshoreman, injured as a result of the joint and concurring negligence of the ship and the employer, in disregard of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, that the liability of the employer to pay compensation to the injured employee shall be conclusive of all other liability of the employer on account of such injury.

Although appellant has divided its brief into two points, one supporting an indemnification and the other a contribution theory, we shall treat both of these together, since indemnification is but "an extreme form of contribution" and appellant's right to either in the first instance depends upon the question presented on this appeal.

ARGUMENT

Appellant, as a Joint Tort Feasor Under the Findings of the District Court, Is Barred from Recovery Over Against Appellee, by Reason of the Longshoremen's and Harbor Workers' Compensation Act

A. Under Act, Appellee's Exclusive Liability Is to Pay Compensation to Injured Employee

In essence, the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as "the Act") requires that employers of persons employed in maritime employment upon navigable waters of the United States shall be liable for the payment to employees for injuries resulting in disability or death of compensation, in accordance with schedules and procedures set up by the Act. 33 U.S. Code, Secs. 902, 903, 904. Failure of an employer to secure the payment of compensation is a misdemeanor punishable by fine or jail sentence, or both. Sec. 938.

The principal purpose of the Act was to assure longshoremen of compensation for their injuries by bringing them within the protection of a compensation act similar to that of state compensation acts. See S. Rept. 973, 69th Cong., 1st Sess.; H. Rept. 1767, 69th Cong., 2nd Sess.; and 67 Cong. Rec. 10608-10614, 68 Cong. Rec. 5402-5414, 5900-5909. To this end the injured employee is accorded compensation regardless of fault or negli-

gence on his part. In return for thus being stripped of its common law defenses, the employer was given a fixed and exclusive liability, or, as has been said, "as an equitable adjustment for imposing liability where none was recognized previously" the Act "fixes the quantum of liability" of the employer. Baccile v. Halcyon Lines, 1951 A. M. C. 542, 187 F. (2) 403 (CA 3, 1951).

So Sec. 905 provides that "the liability of an employer prescribed in Sec. 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and any one otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury. . . ."—with an exception not here relevant. The Act thus exempts an employer, such as the appellee, from any obligation to pay damages to its injured employees or anyone otherwise entitled to recover damages and substitutes therefor an absolute duty to pay compensation. American Mutual Liability Insurance Co. v. Matthews, 1950 A.M.C. 1272, 182 F. (2) 322 (CA 2, 1950). Manifestly, these requirements indicate that the purpose of the Act is "social in character and its method of effectuating the social policy is to force upon industry a real cost of its productive operations". Baccile v. Halycon Lines, supra.

Insofar as any action by an employee against his employer for the latter's negligence, the language of the Act makes it plain that the employer's liability for compensation under the statute is exclusive of any other lia-

bility either at law or in admiralty to its injured employee, or anyone suing in their right[1]. See South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 256 (1940). Likewise, the language of Sec. 905 makes it apparent that not only is an employee and any other claimant standing in the shoes of the employee or deriving his rights through him barred by the statute, but that the language "otherwise entitled to recover damages from such employer" means that all claimants, whether asserting a derivative right "or otherwise", are barred from seeking to recover damages from the employer as a result of the injury involved. Standard Wholesale Phosphate & Acid Works v. Rukert Terminals Corp., 1949 A.M.C. 818, 65 A. (2) 304 (Md. 1949). Other provisions in the Act with respect to the employer's rights as against third persons do not negative this exclusive liability[2].

Under the language of Sec. 905, if an employee injured within the scope of his employment by the negligence of his employer and a third party proceeds jointly against both wrongdoers, his suit against his own employer must fail by reason of the exclusive statutory

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[1] In reporting out Senate Bill 3170, 69th Cong., 1st Sess., which eventually became the Longshoremen's and Harbor Workers' Compensation Act, the Senate Judiciary Committee stated with reference to Sec. 905: "Sections 4, 5 [the present Sec. 905] and 6 of the bill contain the appropriate provisions for making certain that the compensation will be paid, abolishing liability on the part of the employer except for the payment of the prescribed compensation, and fixing the time at which compensation begins." Senate Report 973, 69th Cong., 1st Sess. p. 16.

[2] Sec. 933 provides, in part, that an employee may sue a third party in lieu of taking compensation from his employer; that if the employee fails in such action to recover as much as the statutory compensation, the employer must stand for the shortage; that where the employee accepts compensation, the employer becomes the assignee of the employee's rights against the third party; and that if the employer succeeds in recovering more than he has paid as compensation, such excess, less costs of enforcement, belongs to the employee.

liability granted in the Act. See Benevento v. United States, 1947 A.M.C. 469, 473, 160 F. (2) 487 (CA 2, 1947). If, however, in the same situation, the employee sues only the third party and the latter impleads and seeks recovery over against the employer by reason of the latter's negligence, we have exactly the same case. Once again the exclusive liability of the employer acts as a bar against the third party claimant who might otherwise be entitled to recovery over for the damages on account of the injury to the employee for which he is held liable.

It is in recognition of this fundamental fact—that an employer's exclusive liability on account of injuries to his employees is the payment of compensation—that a number of courts have refused to allow a third party sued by an injured employee to implead the employer in the action. Johnson v. United States, 79 F. Supp. 448 (D. Ore. 1948); Frusteri v. United States, 76 F. Supp. 667 (E.D. N.Y. 1947); Calvino v. Pan-Atlantic S.S. Corp., 29 F. Supp. 1022 (S.D. N.Y. 1939); Miranda v. City of Galveston, 1951 A.M.C. 1309 (S.D. Tex. 1951); Standard Wholesale Phosphate & Acid Works v. Rukert Terminals Corp., supra.

B. Because of the Act, Appellant May Not Recover Over Against Appellee as a Joint Tort Feasor

Although the Act makes it clear that the appellee is not liable in damages for its negligence to libellant Marshall, appellant has pleaded as the basis for its re-

covery over against the appellee and has predicated its case on the ground that it was free of any negligence and that the proximate causes of the accident were appellee's negligence combined with the contributory negligence of Marshall (Ap. 8-11). No contractual obligation to indemnify was pleaded or proved, nor were any claims advanced that appellee was liable over to appellant on any basis other than the tort it allegedly committed against Marshall.

Under this state of the pleadings and proof if the District Court had agreed with the appellant that it was free of all fault and that appellee had been guilty of negligence, then two results would have necessarily followed: appellant could not have been held liable in damages to the libelant; and no judgment could have been given against the appellee on behalf of the libelant, since appellee's exclusive liability to the libelant was to pay him compensation, and not damages.

However, the District Court found that the appellee, in fact, was not free from fault and that its negligence was a joint and concurring cause of the accident (Ap. 16-17, 19). Appellant in its brief (pp. 6-7) takes issue with these findings, deeming them a "conclusion of law", and relies upon Barbarino v. Stanhope SS Co., 1945 A.M.C. 1409, 151 F. (2) 553 (CA 2, 1945), and Bonnewell v. United States, 1948 A.M.C. 1954, 170 F. (2) 411 (CA 4, 1948). These two cases do not deal with causation but with the usual rule that an appellate court can make its own determination of the duty or standard of care owed by an alleged tort feasor; they do not disturb

the general rule that what is the "proximate cause" or the "causation in fact" of an injury is a question of fact to be decided by the trier of the facts, in this instance the trial judge. See 38 Am. Jur., Negligence, Secs. 351, 352; Prosser, *Torts* (1941 Ed.), Sec. 50. In any event, in another part of its brief appellant concedes that "both the ship and the stevedore company were negligent" (p. 7) but thereafter endeavors to play down the extent of its negligence and magnify that of the appellee's.

But irrespective of whether the appellee was 10% or 90% negligent, the fact remains that the appellant is necessarily trying to recover over against the appellee as a joint tort feasor, i.e., as one whose negligence concurred in and contributed to the accident.

As a matter of statutory policy and of logic, appellee cannot have any different or greater liability under the Act if it is a joint tort feasor rather than a sole tort feasor. If appellee's only liability is to pay compensation when it is solely at fault, how can it be said to have any greater or different liability as a joint tort feasor when it is obviously less at fault?

Individually, the appellee has no liability to Marshall except for compensation and jointly with others its liability can be no greater. This is so whether appellee's responsibility for the accident is 10% or 90%, because "there is no body of sure authority for saying that differences in the degrees of fault between two tort feasors will, without more, strip one of them, if he is an employer, of the protection of a compensation Act." Slat-

tery v. Marra Bros., 1951 A.M.C. 183, 186 F. (2) 134 (CA 2, 1951), cert. denied 95 L. Ed. Adv. 533 (April 23, 1951).

Moreover, as a matter of common law or maritime law, the common liability necessary to find a basis for allowing any recovery over between joint tort feasors is missing. For a right of contribution to exist among tort feasors, they must be joint wrongdoers in the sense that their torts have imposed a common liability on them to the injured employee. American Mutual Liability Insurance Co. v. Matthews, supra. A person compelled to discharge a liability for a tort cannot recover contribution from another whose participation in the tort gave the injured party no cause of action against him. 13 Am. Jur., Contribution, Sec. 51.

Here the appellant and appellee were not under a common liability to the libelant. His claim against the appellee was not for damages, as was his claim against the appellant, nor was it dependent upon any tort committed by appellee. Consequently, there is no common basis of liability between appellant and appellee and no grounds exist for any recovery over. *Matthews* case, supra.

Although the *Matthews* case may well be deemed the leading case and was recognized as such by the trial court below, there are numerous recent cases—contrary to some of the earlier district court cases cited in appellant's brief—which hold that a third party sued by an injured longshoreman may not look to the longshoreman's employer for indemnification or contribution in a

factual situation where the third party has contributed in some measure to the injury and where there is no contract of indemnity involved. Slattery v. Marra Bros., supra; LoBue v. United States, 1951 A.M.C. 840, 188 F. (2) 800 (CA 2, 1951); Liberty Mutual Insurance Co. v. Vallendingham, 1951 A.M.C. 287, 94 F. Supp. 17 (D.C. 1950); Miranda v. City of Galveston, 1951 A.M.C. 1309 (D.C. S.D. Tex. 1951); Porello v. United States, 1946 A.M.C. 163, 153 F. (2) 605, 607 (CA 2, 1946); Standard Wholesale Phosphate & Acid Works v. Rukert Terminals, supra; *accord* cases at end of part A of this brief; see Spaulding v. Parry Navigation Co., 1951 A.M.C. 441, 443, 187 F. (2) 257 (CA 2, 1951).

A good summary of some of the reasons lying behind these holdings was made by the Maryland Court of Appeals in the *Standard Wholesale P. & A.* case, supra, which was decided a year prior to the *Matthews* case:

> "In the absence of waiver, the employer's conformance with the statute, by providing compensation in all cases regardless of fault, prevents recovery against him on the ground of negligence. The statute declares his liability for compensation to be exclusive. If it should be construed to preserve his liability, for the payment of a sum measured in whole or in part by the damages sustained by the employee, merely because the negligence of a third party concurred, or is claimed to have concurred, with his own in producing the injury, his liability for compensation would not be exclusive. It is probable that his liability would in most cases exceed the limits set up in the statute. We think it is immaterial whether his liability to a joint tortfeasor stems from a statutory right to contribution or from general principles of the admiralty law. In

> either event it is essentially a liability to pay, or share in the payment of, damages for the injury to his employee, of which the statute relieves him. We think the appellant falls squarely within the definition of 'anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury.' It follows that his right to indemnity or contribution is foreclosed by the Act, and hence the employer cannot be impleaded."

Appellant finds fault with the *Matthews* case as being "wrong" under case precedents (discussed infra) and as being out of accord with principles of "fairness" (App. Br. 13-19). Appellant apparently can not reconcile itself to the fact that here we do not merely have the case of two tort feasors among whom admiralty will divide damages; but rather that of two tort feasors, one of whom is an employer subject to the obligations imposed by the Act whereby it has been made absolutely, though limitedly, liable but in return has been given a release from any other liability. To allow recovery over means that the employer loses even the limited part of the absolute liability put on it by the Act. Fairness is, after all, a relative matter; and the *Matthews* case drew the line in keeping with the purpose and language of the Act. If appellant disagrees with the balance of equities struck by the Act, it should urge its case before Congress and not, we submit, before this Court. Further, we would point out that appellant can always protect itself against situations like the present one by contract, as, for example, the United States did with its so-called Warshipsteve contracts. See United States v. Arrow Stevedoring Co., 1949 A.M.C. 1444, 175 F. (2) 329 (CA 9, 1949), cert. denied 338 U.S. 904 (1949).

Appellant also finds fault with *Johnson v. United States,* supra, on the ground that the "shipowner's right to contribution against the stevedore employer has no effect whatever on the employee's right to compensation if he elects to receive it" (App. Br. 11). If the employee elects to receive compensation, it is not discernible how he may proceed against the shipowner; but in any event appellant misses the point of Judge McColloch's few well-chosen words that to permit an employer under the Act to be impleaded by a third party is to permit him to be sued indirectly and is like opening a hole in the dike that the compensation acts constitute. Clearly if the employer may be held accountable indirectly for that which he was not directly accountable, then all elements of fairness are taken out of the Act insofar as the employer is concerned, for he then stands accountable in damages to his employees and he is stripped of the right to plead the many common law tort defenses.

The Matter of Active-Passive Negligence

To justify the relief it seeks, appellant throughout its brief seeks to disregard the fact that its negligence concurred in and contributed to libelant's injury, by referring to appellee's concurring negligence as "active" negligence.

In so doing the appellant presumably seeks to take advantage of cases where courts have, in the *absence* of a compensation act, based indemnity merely upon a difference of the kinds of negligence of the two tort

feasors, as for example, where the negligence of the indemnitee is said to be only "passive" while that of the indemnitor is "active". Such cases, the Court of Appeals for the Second Circuit has noted, may perhaps be accounted for as "lenient exceptions to the doctrine there can be no contribution between joint tort feasors, for indemnity is only an extreme form of contribution" and because "when both are liable to the same person for a single joint wrong, and contribution, stricti juris, is impossible, the temptation is strong if the faults differ greatly in gravity, to throw the whole loss upon the more guilty of the two". Slattery v. Marra Bros., supra.

However, when the Act is present, this may not be logically or properly done. Basic to any such doctrine is that the active and passive tort feasors are both liable to the same person for their joint wrong. If so, when one of the two is not liable, as in this case where the appellee has no liability to libelant, any claimed right to indemnity cannot be based on an active-passive negligence doctrine. Accordingly, where two persons have both contributed to a tort, even though there is a difference in the gravity of their faults, it is not possible to put the whole loss on the "active" tort feasor, if he is not liable to the injured person. Spaulding v. Parry Navigation Co., supra. Furthermore, there is no authority there for saying that the differences in degrees of fault between the appellant and the appellee is sufficient, without more, to strip the appellee of the protection of the Compensation Act. Slattery v. Marra Bros. supra.

Appellant's Authorities

United States v. Rothschild Stevedoring Co., 150 A.M.C. 1332, 183 F. (2) 181, is relied upon by appellant as entitling it to full indemnity (App. Br. 5-7). The issue raised in this appeal was not presented to the court in the *Rothschild* case, nor insofar as we have been able to discover by reviewing the briefs and discussing the case with one of the counsel therein was the effect of the Act ever argued or presented to the court. Such a conclusion is re-enforced by the opinion in the *Rothschild* case which discloses that the "sole question" presented to the court was "which party or parties were responsible proximately for the accident causing the injury". Obviously to be available as a binding precedent on an issue, the court must have had presented to it and dealt with that precise issue.

Another basis for distinguishing the Rothschild case was suggested in Slattery v. Marra Bros., supra, wherein the court noted that "it is not clear that the decision did not presuppose that the stevedore failed in the performance of its contract with the ship". The truth of this observation is borne out by reference to the brief of the appellant in Rothschild case (see pages 12-14, 16-20) wherein recovery over was sought on the ground of the terms of the warshipsteve contract between the shipowner and the stevedore. The appellee therein did not dispute its contractual duty, but contended the accident was not caused by its failure to perform properly under the contract (see appellee brief, p. 27). In contrast, there is no underlying contract or indemnity

agreement in the present case which may serve as the foundation for allowing recovery over against any "primary" tort feasor.

On page 8 of its brief, appellant cites a string of thirteen cases as "the weight of authority" allowing the shipowner contribution against the stevedore. Of these only six appear to be contrary to appellee's position herein and we submit they are not the more recent weight of authority[3]. Four of the cases cited are not in point here as they turn on contracts of indemnification[4]. Another case did not consider the effect of the Act as a bar[5]; and another supports the position of appellee rather than appellant[6].

The Chattahoochee, 173 U.S. 540 (1899), is cited to support the contention that the Act is not applicable (App. Br. 9). This case, however, involved the Harter Act. It has been well distinguished by Judges Swan and Learned Hand in the *Matthews* case, supra. See also, Standard Wholesale P. & A., supra.

Baccile v. Halycon Lines, supra, is cited to prove the Matthews case is "wrong" (App. Br. 13-14). In this

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3 Lascovitch v. S.S. Samovar, 1947 A.M.C. 1046, 72 F. Supp. 574 (N.D. Calif. 1947); Coal Operators Gas Co. v. United States, 1948 A.M.C. 127, 76 F. Supp. 681 (E.D. Pa. 1948); Christon v United States, 1948 A.M.C. 953 (E.D. Pa.); The Tampico, 1942 A.M.C. 955, 45 F. Supp. 174 (W.D. N.Y. 1942); Rederii v. Jarka Corp., 1939 A.M.C. 476, 26 F. Supp. 304 (Me. 1939); Portel v. United States, 1949 A.M.C. 487, 85 F. Supp. 458 (S.D. N.Y. 1949).

4 Severn v. United States, 1946 A.M.C. 1468, 69 F. Supp. 21 (S.D. N.Y. 1946); Green v. W.S.A., 1946 A.M.C. 874, 66 F. Supp. 393 (E.D. N.Y. 1946); Brosman v. A.P.L., 1943 A.M.C. 526 (S.D. N.Y.); American Stevedores v. Porello, 330 U.S. 446 (1947).

5 Barbarino v. Stanhope SS Co., 1945 A.M.C. 1409, 151 F. (2) 553 (CA 2, 1945).

6 Calvino v. Pan Atlantic SS Corp., 1940 A.M.C. 289, 29 F. Supp. 1022 (S.D. N.Y. 1940).

case the court reconciled what it deemed the conflict between the exclusive liability given to the employer under the Act with the "impropriety" of permitting the injured employee by his election to determine which one of two wrongdoers should be held responsible, by allowing the third party to recover from the employer the amount of compensation which the employer would have had to pay to the injured employee had the latter elected to receive compensation. Admittedly a novel case in this field, the Baccile is not contrary to the *Matthews* case, for the court acknowledged that no common liability could be said to exist as between an employer and a third party and refused to allow the third party to recover over more than the amount of compensation because "then the third party is merely the conduit between the employer and the employee for the transfer of damages in excess of compensation". At most the *Baccile* case represents a modification of the result of the *Matthews* case and a judicial reluctance to give full effect to the language and purpose of a Congressional enactment.

American Stevedores v. Porello, 330 U.S. 446 (1947) (App. Br. 16), does not justify the claims made for it, as the court was primarily concerned with other questions. See Johnson v. United States, supra. A stevedore was injured aboard a Navy transport and brought suit against the United States, who impleaded the stevedore. The District Court entered a decree against the United States for damages due to the injury, less a sum due to the libelant as compensation under the Longshoremen's Act, with contribution as to one-half from the em-

ployer. On appeal, the Court of Appeals for the Second Circuit found that the United States was entitled to full indemnity under its contract with the employer and in the course of its opinion stated: "Since the libelant has no cause of action against his employer, the United States can claim no contribution on the theory of a common liability which it has been compelled to pay." 153 F. (2) 605. On rehearing, the Court of Appeals said that the matter of the right of contribution should be left open, since it was not essential to its decision as to the stevedore's liability under its contract with the United States. 153 F. (2) 609. Upon certiorari, the Supreme Court remanded the case to the District Court for the taking of evidence as to the intention of the parties as an aid to construing the indemnity clause in the contract. The Supreme Court said:

> "If the District Court interprets the contract not to apply to the facts of this case, the Court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law."

We submit that a statement that the court is "free to adjudge . . . under applicable rules" does not determine what those rules are, as applied to the facts of the case, but simply leaves the question open, as it was left open by the Circuit Court of Appeals. See Standard Wholesale P. & A. v. Rukert, supra; Rich v. United States, 1949 A.M.C. 2079, 177 F. (2) 688 (CA 2, 1949). Appellant's statement—that by referring to the "applicable rules" of admiralty law the Supreme Court was referring to a preceding statement made by it that the

usual rule in admiralty is for each joint tort feasor to pay a moiety of the damages—is not warranted. The Court's statement with reference to the admiralty rule was made for the purpose of showing that it was possible that the contract itself could be construed to have several alternative meanings.

Coal Operators Gas Co. v. United States, 1948 A.M.C. 127, 76 F. Supp. 681 (E.D. Pa. 1947), relied on as supporting appellant's interpretation of the *American Stevedores v. Porello* case (App. Br. 17-19), was a case where the court thought that the Supreme Court in the Porello case, supra, was "telling the District Judge that, absent the contract of indemnity, he would be free to apply the admiralty rule of contribution". But it appears that his reason for so thinking was that "the Court of Appeals had squarely ruled that there could be no contribution, and the Supreme Court, although it did not mention the position of the Circuit Court of Appeals, certainly must have intended to overrule it." In so ruling, the District Judge overlooked the fact that in the appeal before the Supreme Court the Court of Appeals had expressly left open the question of contribution in denying a petition for rehearing.

C. Appellant May Not Recover Over Against Appellee on a Contract Basis

As a means of distinguishing the *Matthews* case, appellant in its brief (pp. 19-21) suggests—for the first time—that it has a right of indemnity based upon an

implied contract by the appellee to perform properly the work undertaken by it. In its pleadings and in the case which was tried before the District Court, appellant made no claim to indemnity upon the basis of a contract, express or implied, with the appellee.

Concededly, an employer subject to the Act may by contract with a third party bind itself to indemnify the latter against liability resulting from improper performance of the work undertaken by the employer. Matthews case; see United States v. Arrow Stevedoring Co., supra.

Such is not the present case. Appellee had no contractual relations with the appellant, inasmuch as appellee was unloading the steamship HERMAN FRASCH under contract with the owner of the sulphur which was aboard the vessel and not with the ship. Although the findings of the District Court do not reflect this fact, we do not believe that the appellant will dispute it.

In any event, the record is barren of evidence from which a contract between the appellant and appellee can be implied that the appellee would perform its work properly and would indemnify the appellant against any damages suffered by the latter as a result of appellee's failure to do so.

The most that can be said of the relations between the appellant and appellee is that the appellee, like any other business invitee aboard the vessel, was under a duty to use due care and not be negligent with respect to the ship. For any damage to the ship caused by appellee's negligence, the ship would admittedly have a cause of action; and if the appellant was jointly negli-

gent it would undoubtedly be entitled to recover only part of the damage. On the other hand, for any damage to its employee aboard the ship caused by appellee's negligence, the appellee is liable only under the Act; and if the appellant was jointly negligent in causing the injury, then its only basis for recovery over is its relationship with appellee as a joint tort feasor and on this basis its recovery over is barred by the Act. In asserting that it is "ridiculous" to allow the ship to recover half the property damages but not half of the "damages" suffered by the employee (App. Br. 24), appellant once again chooses to disregard the Act and its effect upon the present case.

In point here is Slattery v. Marra Bros., supra, where a longshore employee was injured by a sliding door on a pier which was found to be defectively rigged and was negligently used by the stevedore. The employee sued the tenant of the pier who, in turn, brought a third party complaint against the stevedore for full indemnification on the theory that it was primarily negligent in unsafely using the door. In affirming the dismissal of the third party complaint, the Court of Appeals for the Second Circuit pointed out that right of the pier-tenant to indemnity would have to arise as a result of some legal transactions between the two parties. The court then goes on to point out that under the facts, as here, the pier-tenant had no contract or any other legal relations with the employer except that of joint tort feasor; and on this basis there was no grounds for recovery over under the doctrine of the *Matthews* case.

CONCLUSION

Appellee's sole liability under the language of the Act is to pay compensation, not damages to libelant or anyone like the appellant who might "otherwise" be entitled to recover damages.

To allow appellant to recover over against appellee is to ignore the statutory language and to disregard its plain purpose, by making the appellee indirectly liable for that which it is not directly liable and by making the appellant merely the conduit for the recovery of damages by libelant from appellee.

For the court to impose a non-contractual duty of indemnification or contribution on appellant is to deprive it of the immunity which the Act grants it in exchange for its absolute, though limited, liability to pay compensation to its employees.

In the words of Judge Learned Hand, concurring in the *Matthews* case:

> "I agree that the Longshoremen's and Harbor Workers' Compensation Act need not inevitably be construed to include a release, not only from direct claims by employees, but from contribution to third persons from whom employees have recovered; and the reason I think it should be so construed is that it has imposed upon employers an absolute, though limited, liability, in exchange for a release from the preceding unlimited liability, conditional upon negligence. The release should, I submit, have the same scope as the imposed liability, which Act extends as well to injuries caused by a joint wrong, as to those caused by the wrong of the employer alone."

For the foregoing reasons, we respectfully ask this Court to affirm the decree of the trial court.

Respectfully submitted,

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Proctors for Appellee.